ST 02-8
Tax Type: Sales Tax
Issue: Tangible Personal Property

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,	No. 01-ST-0000 IBT# 0000-0000 NTL# 00 000000000000000
v.	
ABC HEATING AND AIR CONDITIONING CO., INC. **Taxpayer**	**Ted Sherrod** **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General John Alshuler on behalf of the Illinois Department of Revenue; John Doe, *pro se*, on behalf of ABC Heating and Air Conditioning Co., Inc.

Synopsis:

This matter is before this administrative tribunal as the result of a timely protest by the taxpayer of Notice of Tax Liability # 00 000000000000000 issued by the Illinois Department of Revenue (hereinafter "Department") arising from the taxpayer's use of tangible personal property in the performance of installation and repair services in Illinois. The taxpayer protested the assessment and requested a hearing thereon. At the hearing which, with the consent of both parties, was held by telephone, John Doe, the

President of the taxpayer testified on behalf of the taxpayer. Following the submission of all evidence and a review of the record herein, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case against the taxpayer, inclusive of all jurisdictional elements, was established by the admission into evidence of the SC-10-K Audit Correction and/ or Determination of Tax Due ("correction of return") showing a proposed liability for the tax period January 1, 1995 through September 30, 2000 plus penalties totaling $3,417, and Notice of Tax Liability number SF 200113085428005. Dept. Group Ex. 1. [1]

2. The taxpayer is an Indiana corporation, located in Anywhere, Indiana; it has no offices in Illinois. Testimony of John Doe; Dept. Group Ex. 1.

3. The taxpayer is engaged in the business of entering into contracts to perform installation and servicing of heating, plumbing and air conditioning systems in Indiana and Illinois; the taxpayer has never filed an Illinois sales or use tax return. Testimony of John Doe; Dept. Group Ex. 1.

4. John Doe is the President of the taxpayer, and has had an interest in the taxpayer since 1983. Testimony of John Doe.

5. At the request of the Illinois Department of Revenue, the Indiana Department of Revenue conducted an audit of the taxpayer covering the period January, 1997 through December, 1999; upon completion of its audit, the Indiana Department of Revenue sent the Department sales figures for the period covered by its audit. Dept. Group Ex. 1.

6. Subsequent to the Indiana Department of Revenue audit of the taxpayer, the Department conducted a use tax audit of the taxpayer covering the period January 1, 1995 through September 30, 2000. Dept. Group Ex. 1.

7. John Doe met with the supervisor of the Department's use tax audit of the taxpayer on June 30, 2000; at this meeting, Mr. Doe provided the Department with contracts for installation and servicing performed in Illinois. Dept. Group Ex. 1.

8. The Department determined the taxpayer's a use tax liability for the period January, 1995 through September, 2000 using sales figures supplied by the Indiana Department of Revenue and information provided by Mr. Doe. Dept. Group Ex. 1.

9. The Department's use tax determination was based upon the cost of materials used by the taxpayer in Illinois; the Department used the actual cost of materials for all contract jobs except "time and material" jobs; the Department used 50% of the contract price to estimate material costs of "time and material" jobs because it was shown no books or records indicating actual costs. Dept. Group Ex. 1.

10. The taxpayer has been collecting tax on Illinois contract jobs since 1992; all taxes collected in Illinois have been remitted to the Indiana Department of Revenue. Testimony of John Doe.

11. The Indiana Department of Revenue has refunded taxes collected from Illinois customers and remitted to Indiana during the period covered by the Indiana Department of Revenue's audit of the taxpayer (January, 1997 through December, 1999); the amount refunded was approximately $800. Testimony of John Doe.

[1] Unless otherwise noted, findings of fact apply to the tax period.

Conclusions of Law:

The sole issue to be decided in this case is whether the taxpayer owes use tax on materials used to install and service heating, plumbing and air conditioning systems in Illinois during the audit period in controversy. The Use Tax Act ("UTA") (35 **ILCS** 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased from a retailer. 35 **ILCS** 105/3. Section 12 of the UTA (35 **ILCS** 105/12) incorporates by reference sections 4 and 5 of the Retailers' Occupation Tax Act (35 **ILCS** 120/1 *et seq.*), which provides that the corrected return issued by the Department is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. 35 **ILCS** 120/12; 120/4; 120/5. Once the Department has established its *prima facie* case by submitting a certified copy of the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. Clark Oil & Refining Corp. v. Johnson, 154 Ill. App. 3d 773, 783 (1st Dist. 1987). To prove its case, a taxpayer must present more than testimony denying the Department's assessment. Sprague v. Johnson, 195 Ill. App. 3d 798, 804 (4th Dist. 1990). The taxpayer must present sufficient documentary evidence to support its claim. *Id*.

The Department determined that the taxpayer was not engaged in the business of selling tangible personal property at retail, but rather, was properly classified as a construction contractor liable for use tax on the cost of its materials and supplies. Dept. Group Ex. 1. Accordingly, the Department issued a Notice of Tax Liability ("NTL") assessing use tax for the audit period in controversy. [2]

[2] The issuance of the NTL assessing tax liability for the audit period was not barred by the statute of limitations applicable where the taxpayer has failed to file returns. 35 **ILCS** 105/12.

Section 3 of the Use Tax Act (35 **ILCS** 105/3) imposes use tax upon the privilege of using in this state tangible personal property that is purchased from a retailer. Under Illinois case law, use tax is imposed upon any person purchasing building materials for installation into real property. G.S. Lyon & Sons Lumber and Manufacturing Company v. Department of Revenue, 23 Ill. 2d 180 (1961). Such persons constitute "construction contractors" under 86 Ill. Admin. Code sec. 130.1940 (hereinafter "Reg. Section 130.1940") which has existed substantially in its current form since 1990. 14 Ill. Reg. 15463. [3]

Reg. Section 130.1940(c)(1) expressly provides that construction contractors engaged in the sale and installation of "plumbing systems", "heating systems" and "ventilation systems", activities undertaken by the taxpayer in Illinois, must pay use tax on the cost price of tangible personal property used in the performance of these installation services. 86 Ill. Admin. Code sec. 130.1940(c)(1). Moreover, the obligation to pay use tax on the performance of construction contracts in Illinois is applicable to both in-state and out-of-state construction contractors. 86 Ill. Admin. Code sec. 130.2075(c).

During the administrative hearing, Mr. Doe, the President of the taxpayer, admitted that the taxpayer is a construction contractor. He also conceded that the taxpayer did not self assess use tax on the cost of its materials used in Illinois as required by Reg. Section 130.1940. Since construction contractors are required to pay use tax on tangible personal property purchased for installation into plumbing, heating and

[3] Reg. Section 130.1940 has been promulgated by the Department in the exercise of its statutory authority to make and enforce reasonable rules and regulations related to the administration and enforcement of the Retailers' Occupation Tax Act. 20 **ILCS** 2505/2505-25; 20 **ILCS** 2505/2505-795. "Administrative regulations have the force and effect of law and are construed under the same standards that govern the

ventilation systems in Illinois, and the taxpayer admittedly did not do so, the Department properly imposed a use tax assessment for the audit period in controversy.

Even though there is scant evidence in the record regarding the extent of the taxpayer's operations in Illinois, the facts in evidence are certainly sufficient to support the issuance of a Notice of Tax Liability. The prima facie correctness of the corrected return assumes the proper application of the Use Tax Act to the taxpayer. Sprague v. Johnson, *supra*. It is well settled law in Illinois that in order to overcome the presumption of validity accorded a corrected return, a taxpayer must produce competent evidence, identified with its books and records, showing the Department's return is incorrect. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). Accordingly, it was incumbent upon the taxpayer to prove that its presence in Illinois was not sufficient to subject it to the Illinois Use Tax Act. This burden is not unreasonable because it is the taxpayer who has control over its own books and records. These documents would presumably indicate the degree to which the taxpayer operated in Illinois. Through the introduction of such books and records the taxpayer could have proven that the degree of its presence in Illinois was so de minimis as to result in no Illinois jurisdiction to impose tax due to a lack of nexus between the taxpayer and this state. Brown's Furniture v. Wagner, 171 Ill. 2d 410 (1996); Town Crier, Inc. v. Department of Revenue, 315 Ill. App. 3d 286 (1st Dist. 2000). However the taxpayer has failed to do this. Therefore, I find that the taxpayer had sufficient presence in the state of Illinois to subject it to Illinois use tax.

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construction of statutes." Craftmasters, Inc. v. Department of Revenue, 269 Ill. App. 3d 934, 940-41 (4th Dist. 1995).

Mr. Doe contends that the taxpayer should not be assessed tax in this case since he was never informed of the company's obligation to collect Illinois tax and, as an Indiana resident, was not familiar with Illinois law. The gravamen of Mr. Doe's claim is that his mistaken belief that tax was not due should be excused since it is unreasonable to expect an out-of-state businessman to be familiar with the complex intricacies of the Illinois Use Tax Act. However, the Illinois courts have held that an out-of-state taxpayer's mistaken belief that taxes are not due or collectible does not excuse failure to comply with Illinois use tax laws. Brown's Furniture, *supra*; Miller Brewing Company v. Korshak, 35 Ill. 2d 86 (1966). This conclusion has been reached even when the taxpayer has made a good faith effort to ascertain its compliance obligations and received ambiguous directions from the Department. Brown's Furniture, *supra*. Moreover, it is clear from Illinois case law that ignorance of the law is no excuse for compliance failure. Du Mont Ventillation Co. v. Department of Revenue, 99 Ill. App. 3d 263, 266 (3rd Dist. 1981). This is particularly true where the laws that have not been complied with are clear and of long-standing duration, as is the case with Reg. Section 130.1940, the compliance provisions ignored by the taxpayer, which has been in effect since at least 1990. Indeed, it is a principle embedded deeply in our system of jurisprudence that one's ignorance of the law cannot excuse unlawful conduct. People v. Sevilla, 132 Ill. 2d 113, 127 (1989). Accordingly, I find the taxpayer's claim that his ignorance of Illinois law must excuse his non-compliance to be without merit.

In DuMont, *supra*, the court ruled that a taxpayer could not be penalized for failing to timely file returns. This case was based upon a finding that the taxpayer consulted an accountant and otherwise exercised ordinary care and prudence in seeking to

determine its compliance obligations. Contrary to the situation in DuMont, evidence of any attempt by Mr. Doe to ascertain the tax obligations of his company through reasonable investigation and inquiry is conspicuously absent from the record. As President of the taxpayer, Mr. Doe was in the best position to ascertain through competent inquiry what tax compliance requirements would apply. Yet, in spite of the fact that the taxpayer had no apparent background in tax or accounting, and was a stranger to the world of taxation, there is no evidence that he sought advice from a tax professional or the Department (5 **ILCS** 100/5-150; 2 Ill. Admin. Code 1200.110) regarding compliance procedures. Thus, DuMont, *supra*, is distinguishable from the instant case.

Since Mr. Doe, the taxpayer's President, has presented no evidence to rebut the Department's *prima facie* case and has admitted that the taxpayer did not comply with Illinois law, I conclude that use tax was properly assessed in this case. Accordingly, I recommend that NTL No. 00 000000000000000 be affirmed and finalized as issued.

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Ted Sherrod
Administrative Law Judge

Date: January 16, 2002